No. 705

IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

ROBERT DAVID KERCHEVAL, otherwise called "BOB" KERCHEVAL, otherwise called "DAVE" KERCHEVAL, *Petitioner*,

v.

THE UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITION AND BRIEF IN SUPPORT THEREOF.

WILLIAM E. LEAHY,
WM. J. HUGHES, JR.,
Counsel for Petitioner.

GEORGE R. SMITH,
PAUL JONES,
PAUL JONES, JR.,
H. C. WADE,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

AUTHORITIES CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

No.——

ROBERT DAVID KERCHEVAL, otherwise called "BOB" KERCHEVAL, otherwise called "DAVE" KERCHEVAL, *Petitioner,*

v.

THE UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Supreme Court of the United States:

The above named petitioner, Robert David Kercheval, prays for a Writ of Certiorari to review a judgment of the Circuit Court of Appeals for the Eighth Circuit in a cause entitled United States of America v. Robert David Kercheval, otherwise called "Bob" Kercheval, otherwise called "Dave" Kercheval.

Your petitioner was convicted by the District Court of the United States for the Western District of Arkansas of the crime of using the mails to defraud in violation of Sec. 215 R. S. and sentenced to serve

three years in the penitentiary. The conviction was affirmed by the Circuit Court of Appeals, a Petition for Rehearing being denied July 26, 1926.

Jurisdiction.

Under Sec. 240-A of the Judicial Code as amended by the Act of February 13, 1925, this Court has power to review on Certiorari a decision of the Circuit Court of Appeals affirming a conviction in a District Court of the United States.

Questions Presented

1. Where a defendant upon arraignment pleads guilty but later, with the permission of the Court, withdraws his plea of guilty and pleads not guilty, can the fact that he pleaded guilty be used as evidence against him?

In such a case, should not the trial court have declared a mistrial upon the opening statement by the prosecuting attorney that defendant had "once pleaded guilty"? In any event, was it not reversible error for the court to allow the prosecuting attorney to submit in evidence over objection of the defense a certified copy of the plea of guilty?

There is a conflict of decision in the Federal Courts on this question. The Court below held that such proceedings constituted no error.

The Court of Appeals of the District of Columbia in Heim v. United States, 47 App. D. C. 485, held directly the opposite. In that case the prosecution in the course of the trial proved that the defendant had pleaded guilty but later withdrew the plea. The Court of Appeals held this reversible error.

There is also a conflict of opinion on this point among the State Courts. In the case of State v. Myers, 99 Mo. 107, 12 S. W. 516, it was held reversible error.

In People v. Ryan, 82 Cal. 617, 23 Pac. 121, it was held reversible error.

In Heath v. State, 214 Pac. 1091 (Oklahoma, 1923), it was held reversible error.

In State v. Carta, 90 Conn. 79, a majority opinion held it no error. Two judges joined in a dissenting opinion, which was referred to by the court in the Heim case as "conclusive in its reasoning." But in the Heim case itself, one of the judges dissented. So it can be seen the question is not free from difficulty.

2. A further question: whether conversion must not be proved, where charged, upon an indictment charging use of the mails to defraud, is involved. There is a conflict of decision on this point as will be shown later.

The Facts

Defendant was charged with using the mails to defraud in violation of Sec. 215 Federal Penal Code, in that he made various false representations in the selling of oil stock. It was alleged that he organized the Poindexter Royalty Syndicate and the Smackover Jack Pot Syndicate ostensibly for the purpose of dealing in oil royalties and leases, and, in general, engaging in the oil business, whereas, in reality they were merely stock selling propositions. Various representations, alluring in their character, and alleged by the Government to be false and fraudulent, are alleged to have been made by defendant in attempting to sell stock through the mails. It was then alleged that defendant intended to and did convert to his own use the funds thus received for stock subscriptions.

There was no proof, however, that defendant had ever converted such funds to his own use. The Government held this to be unnecessary, regarding such allegations as mere surplusage. Defendant's counsel, however, maintained and still maintain that such allegations go to the heart of the offense charged; in any case once alleged, they must be proved.

When accused was arraigned he pleaded guilty, was convicted, and sentenced. Later he filed a Motion to set aside the conviction and sentence on the ground that he was led to plead guilty by promise of the prosecutor that he would be lightly punished. (R. 397) This Motion, after hearing, was granted by the Court with permission to accused to plead not guilty. Thereupon, he pleaded not guilty and was brought to trial. The prosecuting attorney in his opening statement, over objection, informed the jury to this effect. He stated that defendant had already pleaded guilty to the offense charged (R. 47) though he was now going to trial upon a plea of not guilty. Later on, in closing the Government's case, the prosecuting attorney submitted in evidence a certified copy of defendant's plea of guilty, to which defendant again objected (R. 199-200). The prosecuting attorney then proposed to introduce in evidence a certified copy of the judgment and sentence of the Court which had been entered upon the plea of guilty. (R. 200-201). Upon objection by defense and questioning by the Court as to the purpose for which the judgment and sentence was being introduced, the prosecuting attorney in the full hearing of the jury stated that his object was to show that the defendant did not attempt to withdraw his plea of guilty until after the judgment and sentence, and that the object of defendant's Motion was not really to

withdraw his plea of guilty but to secure a reduction of the sentence. (R. 200-201)

As already seen, not only did the government prove his plea of guilty, but wished to prove, and so far as the jury was concerned, might as well have proved, that defendant was actually convicted of the very offense for which he was on trial; not only convicted but sentenced. In addition, the prosecuting attorney seriously questioned defendant's motives in withdrawing his plea, conveying the impression that defendant was guilty of double dealing with the Court.

But the error is even more strikingly illustrated by what followed. It might be supposed that upon a plea of not guilty a defendant could commence his case ab initio; at least he would not be required by the Government to explain why he pleaded guilty and inferentially *why he now pleads not guilty*. For every man has a right to plead not guilty. But in the present case, the fact of defendant's plea of guilty having been proved, and his motives in so pleading and later pleading not guilty having been impugned, it was clearly up to the defendant to "explain." He was forced to do so by the Government. Bearing in mind always that the only true issues at his trial were his guilt or innocence, not why he pleaded guilty or why he pleaded not guilty or what sentence he hoped to get, the following facts were brought out, all absolutely irrelevant to the issue of guilt or innocence and all highly prejudicial to the defendant's substantial rights, viz.:

1. That defendant, as an inducement to plead guilty, was "offered" three months in jail and a fine of $1000. (R. 388)

2. That there was a clear understanding to this effect with Mr. Arterberry, Assistant United States At-

torney, and Mr. Ross, Post Office Inspector, and that defendant was to have two months to think it over. (R. 389)

3. That defendant, being on bail, went to New York, was returned to Texarkana, pleaded guilty and received a sentence of three years in the penitentiary and a fine of $500.00. (R. 389)

4. That later defendant asked to have his plea, and the judgment and sentence set aside; that the Court, after a hearing, duly set aside the plea, judgment and sentence, and permitted defendant to plead not guilty. (R. 390)

The Prosecuting Attorney in cross-examining the defendant submitted in evidence a certified copy of defendant's Motion to set aside the judgment and sentence. This document sets forth in substance what is referred to above, namely, that accused had an understanding with Prosecuting Attorney Arterberry, Special Prosecutor Shaver, and Post Office Inspector Ross, to the effect that if he pleaded guilty a recommendation of a fine of $1000.00 and three months in jail would be made. Defendant, after hearing this proposal, conveyed to him by the United States Marshal, interviewed Mr. Arterberry in an endeavor to get him to recommend a fine of $2500.00 and no imprisonment. Mr. Arterberry stated that he did not believe the court would accept such a recommendation but was positive that if he pleaded guilty the court would accept Mr. Arterberry's recommendation of a fine of $1000.00 and three months imprisonment. (R. 398) The defendant later went to New York, and because of illness was unable to return on February 12th, the date set for his plea. He wired the District Attorney that he was ill with pneumonia. The District Attorney, however, did

not wait for him to appear voluntarily but had him arrested in New York. (R 399).

On his return he saw District Attorney Langley, at which time Mr. Langley stated that he would not himself make any recommendation. Defendant stated that he did not understand this to mean that Mr. Arterberry would not make any recommendation. He stated explicitly that he relied on Mr. Arterberry to make his recommendation and would not have pleaded guilty unless he believed Mr. Arterberry would do as he promised. He was surprised and dumbfounded when upon his plea Mr. Arterberry made no statement but the court immediately sentenced him. (R. 400)

The prosecution, in cross examining defendant, admitted that at one time at least a promise was really extended to him provided he pleaded guilty. (R. 396) This was also admitted in the Government's response to defendant's Motion to set aside the judgment and sentence. (R. 403-404) The Government, however, contended that all such promises were withdrawn by District Attorney Langley. Defendant, however, repeatedly stated that it was not District Attorney Langley that he was relying upon but Mr. Arterberry. In any case, the question of whether defendant's plea of guilty was entered with the expectation that a recommendation would be made by Mr. Arterberry or after Mr. Langley had informed him that it would not be made, was a question for the Court to decide upon defendant's Motion to set aside the plea and sentence. It was not a question for the jury upon his plea of not guilty. The decision of the Court granting his Motion and setting aside the plea and judgment and sentence settled the point once for all.

The further cross-examination of defendant by the

prosecution found on pages 404 to 407 of the Record was likewise prejudicial, involving a statement by the Prosecuting Attorney to the effect that the Judge on hearing defendant's motion had stated that it was "a judicial farce not to put a man in jail when he got away with $21,000.00."

The Government also tried to pin the accused down to the admission that the same facts existed at the time of his trial as existed at the time he pleaded guilty, and that accused had full knowledge of those facts, all in an attempt to discredit him with the jury. (R. 405.

Decision of the Circuit Court of Appeals.

The Circuit Court of Appeals in holding the admission of the plea of guilty was no error apparently bases its decision upon two grounds:

1. It could not have been error because it was left to the jury to decide whether the plea was voluntarily entered.

2. Because the defendant "knew better than anyone else whether or not he was guilty. Under the evidence in this case a plea of guilty upon his part would have seemed a very reasonable thing." (R. 481)

As to (1) above, it is obvious if this were true, no confession, however inadmissible, would ever constitute reversible error. As to (2), this simply begs the question. In effect the Circuit Court of Appeals says "The plea of guilty was admissible because you *were* guilty." But it is absurd to test the admissibility of a confession by whether or not it states the truth. This is altogether too simple a solution of the matter and hints at the possibility that the Circuit Court of Appeals never considered the point seriously. Its atten-

tion was not drawn to the Heim case and other cases in point until a petition for Rehearing was filed, and this Petition was promptly denied.

Reasons for the Allowance of the Writ

1. It is submitted the court should grant the petition herein prayed for if for no other reason than one of simple justice: It is evident on a reading of this record that the defendant was not given a fair trial. It is shocking to every man's sense of justice to think that upon a plea of not guilty a defendant should be hounded to the jury with the fact that he had already pleaded guilty and compelled to explain his plea of guilty and why he had withdrawn it and pleaded not guilty. It is obvious there is no possible explanation a defendant could make which would be a satisfactory reason to a jury for his previously having pleaded guilty to the offense charged. This itself shows how impossible a fair trial would be under these circumstances.

2. It should be important to this court to secure uniformity of decision on this point and resolve the clear conflict between the decision of the Circuit Court of Appeals in the present case and that of the Court of Appeals of the District of Columbia in the case of Heim vs. U. S. 47 App. D. C. 485.

3. It is to the advantage of the Government that pleas of guilty should be freely entered. The decision below will obviously deter defendants from entering such pleas if they must look forward to the possibility of their being used against them as full judicial confessions.

4. On the other hand, if it is proper that such pleas should be regarded as confessions and be capable of being used against defendants, it would be of great

value to the prosecuting officers of the Government to be able to use such pleas against defendants without fear of reversal by such Appellate Courts as might follow the Heim case.

5. The conflict of decision among the Federal Courts relative to the necessity of proof of conversion where alleged, should likewise be finally settled by this court.

For these reasons it is submitted that a Writ of Certiorari should be issued, and the question involved be determined by this Court.

Wherefore, your petitioner respectfully prays that a Writ of Certiorari may be issued out of and under the seal of this court directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding the said court to certify the above case to this court for review and determination as provided by law, and that your petitioner may have such other and further relief in the premises as to this court may seem appropriate.

ROBERT DAVID KERCHEVAL,

Petitioner.

WILLIAM E. LEAHY,
WM. J. HUGHES, JR.,
Counsel for Petitioner.

Certificate of Counsel

We hereby certify that we have carefully examined the record, and in the light of its contents consider the petition for a Writ of Certiorari well founded and that it is not interposed for purpose of delay.

WILLIAM E. LEAHY,
WM. J. HUGHES, JR.,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION.

I

The Decision in the Heim Case.

In the case of Heim v. U. S., 47 App. D. C. 485, the Court of Appeals for the District of Columbia had before it a prosecution for adultery, wherein, upon arraignment, defendant entered his plea of not guilty. Thereafter, when the case came on for trial, he was without counsel and asked leave of the Court to withdraw his plea of not guilty, and enter a plea of guilty, which was granted. Later defendant moved the Court to allow him to withdraw this plea of guilty and again enter a plea of not guilty. This was granted and he went to trial upon this plea of not guilty. In the course of the trial the Government proved, over objection of defense, the plea of guilty. This was the only assignment of error dealt with in the opinion.

The Court held, reversing, that confessions belong in two general classes, judicial and extra-judicial. A plea of guilty is a judicial confession. The objection of defense went to the admissibility of the confession. The Court said:

> "There is but a single question presented,—Is such an admission of guilt ever made under such circumstances as to make it competent evidence upon a trial under a substituted plea of not guilty?
>
> "A plea of guilty to an indictment is made under conditions of duress which require the utmost discretion in receiving it. A defendant should only be permtited to enter such a plea after being admonished by the court as to its consequences. When thus made, he waives the right to trial by jury, and solemnly confesses the truth of the charge made in the indictment.

"* * * The plea of guilty to an indictment amounts to a conviction. It is a conclusive confession of the truth of the charge; hence, the admission of such a plea in the trial under a substituted plea of not guilty, if the confession is to be given the legal inferences which render confessions as matter of law admissible, must logically be sufficient without corroboration to sustain a verdict of guilty. *Matthews* v. *State*, 55 Ala. 187, 22 Am. Rep. 698; *State* v. *German*, 54 Mo. 526, 14 Am. Rep. 481."

The Court stated that its attention had been invited to only three cases in this country where a plea of guilty had been used against a defendant who was later allowed to plead not guilty. It then reviewed the case of *State* v. *Myers*, 99 Mo. 107, 12 S. W. 516. There the defendant, upon a trial of murder, pleaded guilty in open court. The court refused to accept the plea which was not recorded and set the case for trial. At the trial the prosecution proved the fact that the defendant had previously pleaded guilty. In reversing, the Appellate Court held:

"Such testimony should not have been admitted. The confession being what is termed 'a plenary judicial confession,' that is, a confession made before a tribunal competent to try him, was sufficient whereon to found a conviction. 1 Roscoe, Crim. Ev. 8th ed. 40. Consequently, the trial court might have proceeded at once to pass sentence upon the accused * * * No one would contend that, if the plea of guilty had been entered of record, such plea could have been received in evidence against the defendant, and yet the same principle is involved whether the plea actually go upon record or not; in either case, it must, if received in evidence, be *conclusive* of the

> defendant's guilt * * * By refusing to receive the plea and granting the defendant *a trial*, this of necessity meant a trial with the issues of fact to be determined by the jury, and not to be determined by the previous plea of the defendant, which admitted all that the State desired to prove. In short, the trial court could not refuse to receive the defendant's plea of guilty at one time, and then use it against him at another."

In the second case referred to by the Court in Heim v. U. S., namely, *People* v. *Ryan*, 82 Cal. 617, 23 Pac. 121, the court reversed the conviction below upon the ground that the admission in evidence of the plea of guilty was reversible error. The court said :

> "Can it be that a privilege thus conceded to a defendant of *substituting* one plea for another is to have the inevitable effect of defeating the whole object of the 'substituted' plea?"

The third case discussed by the Court in Heim v. U. S. was the case of *State* v. *Carta*, 90 Conn. 79, L. R. A. 1916E, 634, 96 Atl. 411. This was the only case cited in favor of submitting in evidence a plea of guilty at the trial. Referring to this case, the Court of Appeals of the District of Columbia said:

> "Three judges announced the majority opinion, resting the decision upon the case of *Com.* v. *Ervine*, *8 Dana*. 30, a case of remote analogy, as we shall observe later. Two judges joined in a dissenting opinion, not only conclusive in its reasoning, but in which an overwhelming array of authority is marshaled."

The Court then went on to say that text writers were unanimous in condemnation of the practice, citing

Wharton Crim. Evidence, 10th Ed. 638; 2 Encyc. Pleading & Practice 779; 8 Ruling Case Law 112, Abbots Trial Brief 314, and pronounced the Ervine case, *supra,* to be only remotely analogous.

Referring to the instruction to the jury in the Heim case, which was somewhat similar to the instruction in the present case, the Court said:

> "Nor can the error be cured by an instruction of the court to the jury attempting to place a limitation upon the weight to be given evidence of such a confession. Its admission under any circumstances is such an invasion of the right of one accused of crime to a fair and impartial trial that the error is incurable. It is so destructive of the rights of the accused that the court will not stop to examine into the technical accuracy of the objection made to its admission, but will, in the furtherance of justice, take cognizance of the error and refuse to charge the defendant with any waiver of his rights through the oversight or neglect of his counsel to state with legal precision the grounds of his objection. *Wiborg* v. *United States*, 163 U. S. 632, 41 L. ed. 289, 16 Sup. Ct. Rep. 1127, 1197; *Crawford* v. *United States*, 212 U. S. 183, 194, 53 L. ed. 465, 470; 29 Sup. Ct. Rep. 260, 15 Ann. Cas. 392; *Miller* v. *United States*, 38 App. D. C. 361, 365, 40 L. R. A. (N.S.) 973."

As to the contention that the Ryan case should be distinguished for the reason that the withdrawal of the plea of guilty was due to statutory authority, the Court held that, if the plea of guilty was set aside, it mattered not from what source the authority to set it aside was derived. It said:

> "The authority for the act, so long as it existed, fixed the status of the defendant. After the plea

of guilty was withdrawn, the case was in precisely the same condition as if the plea of not guilty had been originally entered. The admission of guilt had disappeared from the case, because the court, in the exercise of its sound discretion, had determined that, in jusice, it should go out of the case. When it was stricken out, its evidential effect as a confession disappeared. To reinstate it in the form of evidence against defendant is to deprive him of any advantage gained by the withdrawal of the plea of guilty, and restore him to a position where inevitable conviction awaited him at the hands of the jury. As was said in the dissenting opinion in the *Carta Case, 90 Conn.* 79, L. R. A. 1916E 634, 96 Atl. 411: 'Considerations of fairness would seem to forbid a court permitting for cause a plea to be withdrawn for cause, and at the next moment allowing the fact of the plea having been made to be admitted in evidence with all its injurious consequences, as an admission or confession of guilt by the accused. The withdrawal is permitted because the plea was originally improperly entered. No untoward judicial effect should result from the judicial rectification of a judicial wrong.'

"The judgment is reversed, and the cause remanded for a new trial."

The Supreme Court of the United States refused to disturb this decision when it denied the Government's petition for a writ of certiorari. 247 U. S. 522, 22 L. ed. 1247 (Memo.).

Of like importance: *Green* v. *State,* 24 So. 537 (Fla.), wherein the Court said:

> "The authorities cited by counsel on this ground sustain the view that when an accused first pleads guilty to a charge, and afterwards, by permission of the court, is allowed to withdraw

such plea, and put in the general issue, the plea of confession allowed to be withdrawn cannot be put in evidence on the trial."

State v. *Myers*, *12 S. W.* 516 (Mo.), wherein the Court held:

"Evidence that defendant pleaded guilty at a former term of court, which plea the court refused to receive, is inadmissible, and does not require a special objection"; and

Heath v. State, 214 Pac. 1091 (Okla. 1923), in which the Court decided that:

"A withdrawn plea of guilty, for which a plea of not guilty is substituted by authority of court, is not admissible in evidence against the defendant."

In this last case the facts are almost identical with those herein. There the defendant had pleaded guilty and had been sentenced. Later counsel moved to be allowed to withdraw the plea and to set aside the judgment. The motion was granted; the judgment was set aside, defendant's plea of guilty was allowed to be withdrawn, and a plea of not guilty substituted. At the trial, the Court, over defendant's objection, permitted the State to introduce in evidence the record showing a plea of guilty and the judgment thereon. After the trial and conviction, the District Attorney filed a confession of error on the ground that the trial court committed prejudicial error in permitting the prosecution to introduce the plea of guilty which had been withdrawn. Reviewing this confession of error, the Court said:

> "Upon a plea of guilty, no trial upon the question of the defendant's guilt can be had. His plea stands in the place of the verdict of a jury finding him guilty, and for this reason we think that a withdrawn plea of guilty, for which, by authority of law and of the court a plea of not guilty is substituted, would not be admissible in evidence against the defendant as a confession nor as an admission against interest. In our opinion, the rule supported by reason and authority is that a withdrawn plea of guilty, for which a plea of not guilty is substituted by authority of court, is not admissible in evidence against the defendant."

The decisions above cited have been recognized, in effect, in two other courts. In *White* v. *State*, 51 Ga. 285, the Court stated that, if a plea of guilty has been withdrawn by permission and a plea of not guilty substituted, it follows that the plea of guilty simply goes for nothing. In *People* v. *Cignarale*, 17 N. E. 135 (N. Y. Ct. of Appeals), the court held that the withdrawal of a plea left the case without any plea whatever and that the plea thus withdrawn left no legal consequences of any sort or description.

II

The Decision in the Heim Case Is Correct on Principle

It is submitted that upon principle the rulings above referred to are correct. A plea of guilty is a confession of guilt and is equivalent to a conviction. (*16 C. J. 402.*)

> "After a plea of guilty there is nothing further for a court to do than to pronounce sentence. A plea of guilty is like the verdict of the jury. There is no duty of the court to 'convict,' but only to sentence." *People* v. *McEwen*, 2 N. Y. Cr. 307.

> "A plea of guilty is not only an admission of guilt, but is a formal confession of guilt before the court in which the defendant is arraigned. It is, in this respect, altogether different from a full and voluntary confession, formally made before a magistrate or some other person. The latter is merely evidence of guilt. *State* v. *Branner*, 149 N. C. 559, 562, 63 S. E. 169.
>
> "Where the statute permits the plea of guilty and such a plea is accepted and entered by the court in a criminal case, it is the highest kind of conviction of which the case admits. *Green* v. *U. S.*, 40 App. D. C. 46, L. R. A. (N. S.) 1117.

A plea of guilty, therefore, stands upon an entirely different plane from any other confession, either judicial or extra judicial. It is not evidence like any other confession, tending merely to prove the charge, but it is a conviction itself. Assume that upon the retrial of a defendant who had been tried and convicted but whose conviction an appellate court had reversed, the Goverment opened the case by announcing to the jury that the accused had already been convicted in that very case, as the Government opened this case in the lower Court by announcing that the defendant had already pleaded guilty, would one contend such a statement proper? If uttered, how long would an appellate court attempt to weigh or determine the effect of the prejudicial error thus patently committed. A plea of guilty is more than a confession. That aspect of the plea is merged in its other aspect, that of a judicial act, *i. e.*, a conviction. In other words, a plea of guilty is just as much a judicial determination of the guilt of an accused as a conviction by a jury. If, therefore, when a conviction is set aside and defendant goes to trial anew, it would obviously be reversible error of

the most flagrant type for the Government to prove the previous trial and conviction, upon what reasoning can the course be defended which the Government pursued in this case? Is the error in the latter less prejudicial than in the former instance? Upon what ground can it be defended?

From another viewpoint, also, a plea of guilty should always be regarded as inadmissible. There is something inherently shocking to our sense of fairness in the prosecution's entering upon the trial of a case, wherein the accused is presumed by law to be not guilty until proved guilty beyond a reasonable doubt, by announcing to the jury that the accused has already actually pleaded guilty, not to another or similar crime, but to the identical offense for which the jury is about to try him. Far fetched legal analogies as to the *right* of the prosecution to use the plea of guilty thus withdrawn, viewing it merely as a confession, should not outweigh this fundamental common sense consideration. The foundation of our criminal law is that the accused should be entitled to a *fair trial.* This should mean a trial upon the facts uninfluenced by any reference to previous acts of the defendant the effect of which the court has once destroyed. The case should go to the jury upon its merits and the evidence then presented, not upon the judicial act of the defendant in once pleading guilty,—an act the Court determined, by permitting its withdrawal, to have been either a mistake, an error of judgment, or an act in its nature involuntary, resulting from hope or fear.

III

It Is Common Knowledge That Most Pleas of Guilty Are Entered in the Hope That a Lighter Sentence May Be Awarded

It will be noted that in the Heim case, the Court gravely questioned whether a plea of guilty, later withdrawn, is ever made under such circumstances as to make it competent evidence. The Court said that a plea of guilty is made under such conditions of duress as to require the utmost discretion in receiving it. The Supreme Court of the United States as far back as Bram v. United States held such duress might consist in either hope or fear (*Bram* v. *United States*, 168 U. S 532). Even without any direct testimony from defendant to that effect, judges and lawyers are all alike aware that most pleas of guilty are usually entered, not as the spontaneous act of the defendant, but with the distinct hope that he may be dealt with more leniently. This hope is founded often upon a direct understanding with the prosecution. This is the foundation of that universal rule which allows a defendant, upon pleading guilty, later to withdraw his plea, if he so desires, and to substitute in lieu thereof his plea of not guilty.

> "The court ordinarily will permit the plea of guilty to be withdrawn if it fairly appears that the defendant was in ignorance of his rights and of the consequences of his act or was influenced unduly and improperly either by hope or fear, in the making of it, or if it appears that the plea was entered under some mistake or misapprehension." (*16 C. J. 398.*)

Such pleas are so frequently entered upon advice of counsel and for other reason influencing the defendant that it is recognized they are often not voluntary within the meaning of the law.

IV.

The action of the court in allowing defendant to change his plea from guilty to not guilty is a conclusive determination that the plea was not voluntary and this determination is binding upon the trial judge.

Where a court allows such a plea to be withdrawn, its action conclusively establishes the fact that the plea was, initially, involuntary. Otherwise the Court's action is reduced to an absurdity. Certainly if a court were convinced that the plea was strictly voluntary and entered with a full understanding of its nature it would never allow the accused to withdraw his plea at all. It would not do so through mere caprice. The Court is not compelled by law to allow him to change his plea and numerous authorities may be cited for this proposition. *16 C. J. 397*, note 6; page 398 (Note 12.) If, therefore, a court has granted a defendant's motion to withdraw his plea of guilty, it must have found that the plea was in some sense involuntary, *i. e.*, induced by hope or fear. If it was involuntary, it is inadmissible even as a confession. The latest definition by the Supreme Court of a voluntary confession is in the Wan case, that "a confession is voluntary in law if, and only if, it was in fact voluntarily made." (*Wan v. United States*, 266 U. S. 1, 14.) When, therefore, the court has permitted a defendant to withdraw his plea of guilty, therefore made, a conclusive presumption should and does result that such plea was involuntarily entered, within the meaning of the law. This ought to and does render the question of its voluntary character and its admissibility against the defendant later *res adjudicata* for the entire case. This is the only logical result which can flow from

the action of the Court when it allows it to be withdrawn. (See *6 A. L. R. 687.*)

And as to its discretion and right to deny a request to change such a plea, see *6 A. L. R. 687; 20 A. L. R. 1441;* also *Annotations 1926 Supplement A. L. R. 243.*

The error committed by the trial court and inadvertently affirmed by this court is clear upon an inspection of this record. Throughout, the plea of guilty has been treated as an ordinary *extra-judicial* confession, and the law and the practice in determining admissibility of the latter erroneously applied to the admission of the plea. The distinction between the two is plain and of the most vital importance to the defendant, as hereinbefore pointed out. Thus, the trial court instructed the jury that:

> "The plea of guilty is introduced as evidenced by the Government. You are to take that into consideration, that is, you will take it into consideration upon a certain condition. If you find that Mr. Kercheval made that plea of guilty and no promise was held out to him for the purpose of getting him to make that plea, or if you find that he was notified before he made the plea that nothing that was ever said to him with reference to it theretofore would be met, then it is evidence for you to consider in connection with the other evidence in the case. If you find out however that he was included, and you are to take all the facts and circumstances into consideration—you are to take Mr. Kercheval's intelligence into consideration in connection with whether or not he could be deceived in a matter of that kind. I say if you find that he was deceived; that this was brought about by conversations that he had had with reference to it, and that he made that plea of guilty when as a matter of fact he was not guilty, then you will disregard that particular

part of it and consider just the other testimony in the case."

This court in its opinion sustaining that portion of the charge says:

"While there was evidence of defendant that some promise had been made him by a Special Assistant District Attorney, Mr. Arterberry, as to punishment in case he pleaded guilty, the evidence of the District Attorney shows that defendant was fully informed by him before the plea that if he did plead guilty it would be upon his own volition and that no promises whatever would be made to him. It is true in the federal courts, as stated in Ziang Sung Wan v. United States, 266 Fed. 1, 14, that 'the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or a threat. A confession is voluntary in law if, and only if, it was, in fact, voluntarily made.' There is no claim here of any compulsion applied to defendant. The court left it to the jury as to whether the plea of guilty was voluntary or made under some kind of a promise held out to him by which he was deceived. If the latter it was to be entirely disregarded. Certainly this was all defendant could claim under the facts of this record. McBryde vs. United States, 7 Fed. (2d) 466. In the motion made by defendant to set aside the judgment he admits that he had pleaded guilty. The purpose was to reduce the punishment, but if this failed he asked to withdraw his plea, and that the judgment be set aside. We know of no reason why the plea of guilty was not admissible under all these circumstances for what it might be worth. It was not conclusive of guilty and the court so instructed the jury. The defendant probably knew better than anyone else whether or not he was guilty. Under the evidence in this case a plea of guilty

upon his part would have seemed a very reasonable thing. We see no substantial or prejudicial error in the admission of any of the evidence complained of."

Thus, both at *nisi prius* and on writ of error, the law which directed the jury in its deliberations and sustained the trial judge in his charge was the law which governs the admissibility of *extra judicial* confessions, not *judicial* confessions in the form of a plea of guilty which in itself is in effect a conviction, not merely evidence for the consideration of the jury in proving a conviction. This is clearly pointed out in Heim vs. United States, *supra*. McBryde vs. United States, 7th Fed. (2d) 466, relied upon by this Court in its opinion, is authority only in reference to *extra judicial* confessions. Two of the four cases quoted as authority by the court in McBryde vs. United States originated in the District of Columbia, resulting the one in a reversal in the Supreme Court of the United States and the other in merely following the settled law of the District of Columbia and Federal Courts generally in regard to the admissibility of *extra judicial* confessions. That the jury should not always be allowed to consider even an *extra judicial* confession upon instruction as to the law in reference thereto, is established by the reversal of the Court of Appeals of the District of Columbia in the Wan case, *supra*. In that case the trial judge thought it proper to follow the settled practice and permit Wan's confession to go to the jury under the law governing its admissibility as given the jury by the court. In that case also there was conflict in the evidence surrounding the making of the confession, a sharp and serious conflict. The presiding justice believed it the duty of the

jury to solve that conflict and to consider or reject the confession according to their determination of the truth of the circumstances under which it was made—a practice hazardous for the accused at best where there is any substantial evidence that the confession was made under circumstances rendering its character involuntary. In reversing, the Supreme Court unanimously held that, regarding that confession, notwithstanding the conflict in testimony, as matter of law the confession was involuntary and the trial judge should have refused to permit it in evidence before the jury. Wan has been retried twice since. In neither trial did the prosecution attempt to introduce that confession. The evidence was carefully and strictly limited. The line to which the testimony might approach was marked sharply and nicely. The court was diligent to protect Wan from any reference to his former confession. The jury neither knew nor heard anything of it. It was as if the confession had never been made. In the instant case the court had once concluded the plea of guilty was entered under such circumstances that, upon application for leave to withdraw the same, the plea was withdrawn and another substituted in its place. That determination, allowing the motion to withdraw, concluded just as finally the questions improperly raised at this defendant's trial to his disadvantage as the decision of the Supreme Court finally settled all reference to the confession of Wan.

In Murray vs. United States, 288 Fed. 1008, 1013, 53 Ap. D. C. 119, the Court of Appeals of the District of Columbia merely announced the familiar principle of law applicable to the admissibility of *extra judicial* confessions whenever their admission in evidence at

the trial is attacked upon appeal. Both the Wan and the Murray cases, therefore, are authority only for confessions made outside the forum of the court and in no way relate to the right of the prosecution to introduce in evidence against the defendant a plea of guilty made in the solemnity of a judicial proceeding, but later withdrawn by leave of the same tribunal after motion made and hearing had thereon. The same court which considered both the Wan and the Murray cases is the only Federal Court, so far as the diligence of counsel can discover, which has had before it the decision of the admissibility in evidence against the defendant of both *extra judicial confessions* and a *plea of guilty entered but withdrawn by leave of court*. The great weight of State authority is with the opinion in Heim vs. United States, *supra*. Of the distinction between the two the Court of Appeals of the District of Columbia says:

> "We are not here concerned with the rules which govern the admissibility of extra judicial confessions or judicial confessions made before a committing magistrate, which stand upon an entirely different plane from the grade of judicial confessions we are here considering. The plea of guilty to an indictment amounts to a conviction. It is a conclusive confession of the truth of the charge; hence, the admission of such a plea in the trial under a substituted plea of not guilty if the confession is to be given the legal inferences which render confessions as matter of law admissible, must logically be sufficient without corroboration to sustain a verdict of guilty. Matthews v. State, 55 Ala. 187, 28 Am. Rep. 698; State v. German, 54 Mo. 625, 14 Am. Rep. 481."
>
> (Heim v. United States, 47 App. D. C. 485, 488, 489.)

Thus, the reasoning of both the tiral court in this case and of this Court in its opinion becomes inapplicable. We are no longer concerned with the reasons impelling this defendant's plea in the first instance, his motives or his hopes in making the same. They are not for consideration. They were properly for the determination of the judge who heard and passed on the motion for leave to withdraw. Such questions as whether Mr. Langley informed the defendant no promises would be extended him in the event he pleaded guilty or whether the defendant relied on Mr. Arterberry's assurance, which were commented upon by this Court, were for the attention of that judge upon the hearing of the application to withdraw. Once he determined the plea ought to be withdrawn, that ended all inquiry into those matters, and neither another trial judge or any jury could sit upon his decision by way of review either to correct the same, listen to a reargument of that motion for leave to withdraw or determine the truth of defendant's contention that, when he entered his plea, he did so through hope, fear, or any other influence which rendered it of an involuntary character.

V.

The record in the present case shows vividly the evil of the error complained of.

The astounding consequence to the defendant which can flow from attempting to introduce in evidence his formal plea of guilty withdrawn by leave of court is evidenced by what transpired in this case when the attempt to introduce this plea was made. The error committed was particularly flagrant for the reason that the government opened its case to the jury by stat-

ing that the defendant had previously pleaded guilty (Rec. p. 47.) It later submitted in evidence a certified copy of that plea (Rec. pp. 199-200). It then attempted to submit the judgment of conviction entered up on the plea thus made (Rec. pp. 200-201). Upon objection as to the competency of the entry of that judgment, the prosecuting attorney, in the presence of the jury, stated that its purpose was:

> "Nothing further than to show that the plea was not attempted to be withdrawn until after judgment and sentence was pronounced. And then, when it was set aside further we can show, and will show, if necessary, that after judgment a motion was filed by defendant not to set aside the plea of guilty. He did not ask for that in the motion, but admitted in the motion that the plea had been entered and asked for the sentence to be reduced. However, we will not offer this at this time."

What situation can possibly be imagined more prejudicial to the interests of a defendant entitled to a fair and impartial trial than this, wherein the prosecuting officer first proves the plea of guilty once entered but later withdrawn and then impugns and attacks the motives of the defendant and his reasons for withdrawing it. Those motives and reasons were properly for the consideration of neither the prosecuting officer nor the jury. The court had passed upon them once. Having found the reasons sufficient and the motives proper, the act of withdrawal was no longer the subject of attack by the prosecution as the act of the defendant. If the subject of comment at all, it could be attacked only as the error of the judge.

With the fact of his plea proved against him and his motives and reasons for withdrawing the same as-

sailed, over his objection and exception, the defendant was then driven in his own case to explain the circumstances surrounding his entering the plea. The record (pages 388 to 407) is filled with examination and cross-examination of the defendant regarding conversations had, promises extended, assurances made, hopes raised, and then contrary statements in reference to all of these, all to the most serious damage of the defendant and all made necessary by the initial error made by the court in permitting the plea to be introduced at all after the court had once permitted it to be withdrawn. It is difficult to imagine how more prejudicial error could be committed against a defendant.

VI.

There is a conflict of decision among the Federal Courts as to the necessity of proving conversion where alleged in an indictment charging misuse of the mails in violation of Section 215, Penal Code.

The Court below held that conversion is not an element of the crime of using the mails to defraud in violation of Section 215, Penal Code, and that an allegation to that effect in the indictment was superfluous. (R. 483) The court cited Whitehead, *et al.*, v. U. S. 245 Fed. 385; Wine v. United States, 260 Fed. 911; Calnay v. United States, 1 Fed. (2) 926.

This decision of the Court below is in conflict with the decision of the Court in Moffatt v. U. S. 232 Fed. 523, holding substantially that conversion where charged was an element of the offense.

In the case of U. S. v. Loring, 91 Fed. 881, the Court held squarely that intent to convert the money re-

ceived through the mails to defendant's own use was the necessary part of the scheme to defraud.

Whether or not conversion is necessary in charging an offense under Sec. 215, Penal Code, the position of defendant's counsel is that the allegation having been made it must be proved.

In the case of Brooks v. U. S., 146 Fed. 223, the Court held that in charging an offense against Sec. 215, Penal Code, it was necessary that the particulars of the scheme being matters of substance should be alleged and should be set forth with sufficient certainty to acquaint the accused with what he was required to meet.

In the case of U. S. v. Hess, 124 U. S. 483, the Court said:

> "The essential requirements, indeed, all the particulars constituting the offense of devising a scheme to defraud, are wanting. Such particulars are matters of substance and not of form, and their omission is not aided or cured by verdict."

In the present case there can be no doubt that the allegation that the accused converted the money received to his own use was an essential part of the offense charged; certainly it was alleged in all six counts of the indictment. Having been alleged, it was necessary to be proved. The rule as stated by Wharton, is as follows:

> "Where there is an allegation which described, defines, qualifies or limits a material matter to be charged, it is taken as a descriptive averment, and the general rule obtains that it must be proved as laid, even though such particularity of description was unnecessary." (1 Wharton Crim. Ev. Sec. 146.)

In Zolines Fed. Crim. Law and Procedure, Vol. 2, 1063, under heading of Indictment for Use of Mails to Defraud, it is said:

> "The purpose of requiring a description of the scheme to defraud is to definitely and clearly inform the accused of the scheme charged against him so as to enable him to make his defense. It follows that one must be convicted, if convicted at all, on the scheme as alleged and if the scheme as alleged is not substantially established by the proof, he cannot be convicted."

Greenleaf on Evidence (14th Ed.), Sec. 65, says:

> "But where a person or thing, necessary to be mentioned in an indictment, is described with unnecessary particularity, all the circumstances of the description must be proved, for they are all essential to the identity."

As the Court said in Brown v. U. S. 146 Fed. 218, affirming the principle in the Brooks case, *supra*:

> "It follows that one must be convicted, if at all, on the scheme as alleged, and if the scheme as alleged is not substantially established by the proof, he cannot be convicted."

VII.

The petition for the Writ of Certiorari should be granted.

Respectfully submitted,
WILLIAM E. LEAHY,
WM. J. HUGHES, JR.,
Counsel for Petitioner.

GEORGE R. SMITH,
PAUL JONES,
PAUL JONES, JR.,
H. C. WADE,
Of Counsel.

To WILLIAM B. MITCHELL,
Solicitor General of the United States.

Please take notice that we will file in the office of the Clerk of the Supreme Court of the United States the foregoing petition for a Writ of Certiorari and Brief, together with the printed Record of the above entitled cause, and that on the .... day of November, 1926, we will submit the Petition to the Court.

WILLIAM E. LEAHY,
WM. J. HUGHES, JR.

Received a copy of the foregoing notice of the Petition for a Writ of Certiorari and the Brief referred to therein, this ——— day of October, 1926.

.....
Solicitor General of the United States.